(6)

No. 96-6133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM BRACY,

Petitioner,

v.

RICHARD B. GRAMLEY, Warden,
Pontiac Correctional Center,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge?

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STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief is generally correct. However, respondent wishes to recite a few additional salient facts which are contained in the record.

As to the trial court's denial of co-defendant Roger Collins's motion to suppress evidence, (TR 388), that ruling was deemed proper by the Illinois Supreme Court when reviewed on direct appeal. *People v. Collins,* 106 Ill. 2d 237, 265-266, 478 N.E.2d 267, 278-279 (1985).

After the completion of the guilt phase of the trial, counsel for co-defendant Collins requested a separate sentencing hearing for his client, notwithstanding his assertion that "there is no conflict here, and there wasn't any conflict *per se* between the two defendants[.]" (TR. 1432). Counsel based his request solely on the fear that the State would use as aggravation evidence of an unrelated Arizona double murder and an attempted murder, both committed by Bracy, and that that evidence would be imputed to Collins. (TR. 1433). The trial court denied the request after assuring counsel that a limiting instruction would inform the jury that the evidence applied to Bracy only. (TR. 1438, 1496). This decision was not appealed.

Counsel for petitioner Bracy then sought a continuance in order to investigate the double murder and attempted murder charges pending against his client in Arizona. (TR. 1439). Counsel conceded that he had been served with the complete set of Arizona police reports at the outset of the trial. (TR. 1440-1443). The trial court noted that the jury was empaneled, and that counsel was in possession of the relevant materials. (TR. 1445, 1450).

The Illinois Supreme Court affirmed the trial court's refusal to grant a continuance prior to the commencement of the sentencing hearing. *Collins*, 106 Ill. 2d at 281, 478 N.E.2d at 286. The court noted that Bracy had subsequently been convicted of the Arizona crimes. *Id.* Consequently, the court held:

> Since the purpose of the continuance would have been to allow Bracey's [*sic*] counsel to gather evidence to show that Bracey [*sic*] had not committed the Arizona crimes, we fail to see how he is now prejudiced. If we were to find the denial of the continuance to have been improper and remand for a new sentencing hearing, the State would then introduce Bracey's [*sic*] Arizona convictions into evidence, thus raising an even stronger inference that Bracey [*sic*] committed the Arizona crimes. We do not feel that the denial of the continuance was in error.

Id. at 286-287.

SUMMARY OF ARGUMENT

Rule 6 (a) of the Federal Rules Governing Section 2254 Cases entitles parties to invoke processes of discovery "for good cause shown." Given the extraordinary remedy that habeas corpus provides, with the potential to upset presumptively final and correct state court judgments, this standard must be construed strictly, and be interpreted so as to require a habeas petitioner to first establish a *prima facie* case for relief. This standard would respect doctrines of comity and finality, and prevent the transmutation of an extraordinary remedy into a routine ladder of review. Requiring a threshold showing of some evidence tending to show the existence of the essential elements of the petitioner's constitutional claim before

ordering discovery adequately balances both the State's interests as well as the state prisoner's interest in avoiding illegal confinement.

In the instant case, the petitioner clearly failed to establish a *prima facie* showing that he was denied his constitutional right to an impartial judge. Fairness under the Constitution requires the absence of actual bias in the trial of a case. Petitioner's allegation, however, is one based merely on an appearance of impropriety on the part of the judge presiding at his trial and sentencing hearing. Since there is no precedent from this Court requiring the invalidation of a conviction based on an appearance of impropriety alone, petitioner, in any event, cannot obtain habeas relief on such a basis given this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). The same is true of a bright-line rule invalidating a judge's rulings in any case in which he is known not to have taken a bribe simply because he took bribes in other cases. Accordingly, since petitioner cannot establish a constitutional violation by showing merely an appearance of impropriety, he correspondingly could not make the showing necessary to obtain discovery in support of his due process claim by producing evidence of an untoward appearance only. Moreover, in point of fact, other than the undeniable and regrettable status of the judge himself, petitioner points to nothing that actually raises even an appearance of impropriety. He cites several examples of discretionary rulings that "potentially affected the outcome" of the case, (Pet. Br. at 5-6), but of those rulings that were even appealed in state court, the Illinois Supreme Court found no error.

For these reasons, the district court below did not abuse its discretion in denying petitioner's discovery motion. This Court should, therefore, affirm the decision of the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A DISCOVERY MOTION ON THE PETITIONER'S CLAIM THAT HE WAS DENIED HIS RIGHT TO TRIAL BEFORE AN IMPARTIAL JUDGE BECAUSE HE FAILED TO ESTABLISH THE NECESSARY THRESHOLD SHOWING OF ACTUAL BIAS ON THE PART OF THE JUDGE PRESIDING AT HIS TRIAL AND SENTENCING HEARING.

Petitioner contends that this Court's decisions on judicial bias establish that "a possible temptation to the 'average man' is sufficient to establish a due process violation," and, "once a possible temptation is established by the evidence, prejudice is presumed." (Pet. Br. at 16). Petitioner correspondingly argues that he "made a preliminary showing that Judge Maloney was under a possible temptation to rule corruptly at the time of [his] trial," because the former judge had solicited and accepted bribes in other contemporaneous criminal cases, and, therefore, he was entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge. (*Id.*) For reasons that follow, petitioner's position is untenable.

Rule 6(a) of the Federal Rules Governing Section 2254 Cases entitles parties to invoke processes of discovery "for good cause shown." The Rule affords the district court substantial discretion. *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 1300, 134 L.Ed.2d 440, 452 (1996). In this particular case, where the petitioner must show that the district court below abused its discretion in denying his discovery motion, the wide discretion afforded district courts in ruling on discovery issues clearly operates in the respondent's favor. However, the virtual absolute discretion enjoyed by district courts on questions of discovery in habeas cases has resulted in a lack of uniformity throughout the federal system on the issue of entitlement to the privilege.[1]

The present uncertainty associated with discovery in § 2254 cases was presaged by Justice Harlan in his dissenting opinion in *Harris v. Nelson*, 394 U.S. 286 (1969), this Court's leading case on discovery in habeas cases. Justice Harlan wrote:

> It seems to me that in fairness both to habeas petitioners and to their adversaries, the discovery procedures which are available in such actions should be uniform throughout the federal system and not dependent upon the varying "discovery attitudes" of particular district judges. If discovery procedures are developed case by case, there will at the least be a

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[1] Until recently, the district court had also been afforded a substantial degree of discretion in determining whether to hold an evidentiary hearing in a § 2254 case. That changed on April 24, 1996 when President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. 104-132, 110 Stat. 1214. Section 104 of the new statute establishes limitations on the district courts' authority to grant evidentiary hearings. Although the Act does not speak specifically to discovery, it may be argued that the new statute's limitation on evidentiary hearings and the development of new facts generally, necessarily restricts the district court's power to grant discovery. *See* Brief of *Amicus Curiae* of the State of California filed in support of respondent.

> very long period during which procedures will differ from district to district.

394 U.S. at 305-06 (Harlan, J., dissenting).

This Court's promulgation of the Rules Governing Section 2254 Cases in 1976 sought to impose uniformity in habeas corpus practice. Although after promulgation of the Rules, the district courts' unbridled discretion with respect to discovery was limited—to be exercised only upon a showing of "good cause"—the lack of adequate guidelines in determining entitlement to discovery in habeas cases persisted.

In now determining the correct legal approach to questions of entitlement to discovery in § 2254 cases, one must recall the significant language in the majority opinion in *Harris v. Nelson*. Although giving district court judges considerable discretion in fashioning discovery procedures in habeas cases, the majority made clear that in order for that authority to even be triggered, a district court must first be confronted by a habeas petition which establishes a *prima facie* case for relief. Justice Fortas, speaking for the majority, wrote:

> [W]e conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus *which establishes a prima facie case for relief* may use or authorize the use of suitable discovery procedures . . . to help the court to "dispose of the matter as law and justice require."

394 U.S. at 290 (emphasis supplied). The majority opinion then concluded:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, *be able to demonstrate that he is confined illegally and is therefore entitled to relief*, it

> is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

394 U.S. at 300 (emphasis supplied); *see also Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994) (holding that Rule 6 does not authorize fishing expeditions and that " '[h]abeas corpus is not a general form of relief for those who seek to explore their case in search of its existence' ").

Requiring a claimant to establish a *prima facie* case for habeas relief, in order to obtain discovery in support of a particular constitutional claim, is consistent with this Court's approach to discovery under Federal Rule of Criminal Procedure 16 in cases raising selective-prosecution claims. In *United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Court held that in order to make the requisite showing to establish entitlement to discovery in such a case, the moving party must produce "some evidence tending to show the existence" of the essential elements of the claim. 116 S.Ct. at 1488, 134 L.Ed.2d at 701. The Court reasoned that although subject to certain constitutional restraints, prosecutors have broad discretion in the enforcement of the criminal laws. Also noting that "courts are 'properly hesitant to examine the decision whether to prosecute,'" (citation omitted), the Court cited " '[t]he presumption of regularity [which] supports' prosecutorial decisions. 116 S.Ct. at 1486, 134 L.Ed.2d. at 698. The Court made clear that 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" *Id.* The Court concluded that "discovery thus imposes many of the costs present when the Government must respond to a *prima facie* case of selective prosecution" and, therefore, "[t]he jus-

tifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim." 116 S.Ct. at 1488, 134 L.Ed.2d at 701. The Court's holding makes perfect sense. By requiring a significant threshold showing in order to obtain discovery on a claim of selective prosecution, courts avoid unwarranted and highly intrusive inquiries into a "'special province' of the Executive." 116 S.Ct. at 1486, 134 L.Ed. 2d at 698.

Important concerns, flowing from the significant costs of federal habeas corpus review, are implicated as well when § 2254 review is sought by a state prisoner. "To begin with, the writ strikes at finality." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known." *Id.* "'Without finality, the criminal law is deprived of much of its deterrent effect.'" *Id.* (*quoting Teague v. Lane*, 489 U.S. 288, 309 (1989)). "And when a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time,' prejudice the government and diminish the chances of a reliable criminal adjudication." *Id.* (*quoting Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)); *see also Teague v. Lane*, 489 U.S. at 308-309; *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Reed v. Ross*, 468 U.S. 1, 10 (1984); *Engle v. Isaac*, 456 U.S. 107, 127 (1982) (all reconfirming the importance of finality).

To be sure, "[f]inality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491. Just as a selective-prosecution claim involves judicial intrusion into an area that the Constitution reserves to the Executive Branch, reexamination of state convictions on federal habeas intrudes on "'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* (*quoting Murray v. Carrier*, 477 U.S. at 487). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law, but the power of a State to pass laws means little if the State cannot enforce them." *Id.*

"Habeas review extracts further costs." *McCleskey*, 499 U.S. at 491. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *Id.* "Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*; *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("[t]he state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings.").

The same considerations that require a rigorous standard for discovery in aid of a selective-prosecution claim mandate a strict construction of the "good cause shown" language in Rule 6(a). In the context of habeas litigation, which involves the collateral attack of a state judgment presumed correct,[2] and which extracts significant costs

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[2] For a discussion of the distinctions between the burden of proof normally associated with criminal prosecutions and the standards of review reflecting the degree of deference a re-

(continued...)

as respondent has noted above, an in-depth reexamination of the state judgment should not even begin unless there is a substantial and concrete basis for suspecting that the petitioner is in fact being confined illegally. Respondent contends that requiring a threshold showing of some evidence tending to show the existence of the essential elements of the petitioner's constitutional claim, before ordering discovery, adequately balances the State's aforementioned interests as well as the state prisoner's interest in avoiding illegal confinement. Such a threshold showing would in turn curtail the frequent requests to take depositions and for discovery of documents outside of the record which presently accompany many habeas petitions, especially in capital cases. A less strict required showing, however, risks transforming habeas corpus review—an extraordinary remedy—into yet another routine ladder of review. That prospect is unacceptable, imposing as it would additional and onerous burdens on the States which are unlikely to result in any meaningful increase in the quality of review afforded habeas petitioners. A less strict required showing is also at direct odds with the intent of Congress to limit federal habeas corpus review which is evidenced by the Anti-terrorism and Effective Death Penalty Act of 1996. *See* Brief of *Amicus Curiae* of the State of California filed in support of respondent.

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[2] (...continued)
viewing court must afford with respect to the proceedings in the trial court, *see generally* Sullivan, *The "Burden of Proof in Federal Habeas Litigation*, 26 *Mem. St. U. L. Rev.* 205, 229-232 (1995).

The question in this case thus becomes: what evidence constitutes a *prima facie* case of the violation of the constitutional right to an impartial judge? As respondent noted above, petitioner asserts that "a possible temptation to the 'average man' is sufficient to establish a due process violation" and, "once a possible temptation is established by the evidence, prejudice is presumed." (Pet. Br. at 16). Petitioner's preposed standard, based as it is on speculation and conjecture, is simply untenable.

Petitioner's allegation of the violation of his right to due process is one based merely on an "appearance of impropriety" by the judge presiding at his trial and sentencing hearing. Affirming the en banc Court of Appeals' prior decision in *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 1404 (1995), the majority of the three-judge panel below rejected the notion that an "appearance of impropriety" on the part of the presiding judge means that the conviction in question violates the Due Process Clause. As Chief Judge Posner wrote in the decision below, "[t]he fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he *did* favor the prosecution in such cases more than he would have done anyway." (J.A. 78) (emphasis supplied).

Indeed, an "appearance of impropriety" alone has never led this Court to find that a party did not receive due process of law:

None of [the Supreme] Court's constitutional decisions . . . establishes that an "appearance" problem—as opposed to actual bias—invalidates a judgment. To the contrary, the theme of the cases is exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit. *E.g.*, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 2d 749 (1927).

* * *

Cases sometimes treated as examples of "appearance" problems actually have different emphases. For example, *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971), held that a judge should not preside in a case in which he was the *victim* of a crime. The contemptuous remarks had been directed to the judge, and although historical practice would have allowed the judge to mete out summary punishment, it did not allow the judge to preside at a later trial. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), dealt with a combination of prosecutorial and judical functions that left the judge not only confused about his role but also in possession of evidence he should not have known. *See Withrow v. Larkin*, 421 U.S. 35, 53, 95 S.Ct. 1456, 1467, 43 L.Ed.2d 712 (1975). Thus, *Murchison* holds that the due process claue requires a trial to be limited to evidence heard in court, not that the Constitution precludes adjudication whenever the judge appears to have prejudged matters.

Del Vecchio, 31 F.3d at 1391, 1392 (Easterbrook, J., concurring).

"[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v Cement Institute*, 333 U.S. 683, 702 (1948). Moreover, historically, "[r]equired judicial recusal for bias did not exist in England at the time of Blackstone." *Litkey v. United States*, 510 U.S. 540, 543 (1994). "The due process clauses come from English jurisprudence, which had a simple rule: 'a judge was disqualified for direct pecuniary interest and for nothing else.'" *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring) (*quoting* John P. Frank, *Disqualification of Judges*, 56 *Yale L.J.* 605, 609 (1947)). "The United States took over that tradition, and through the nineteenth century judges saw no difficulty in sitting when their relatives were parties (or lawyers), or in hearing appeals from their own decisions. See G. Edward White, III, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35* 181-200 (1988); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 76 (1985); Frank, 56 *Yale L.J.* at 615-18." *Id.*

Since there is no precedent from this Court requiring the invalidation of a conviction based on an "appearance of impropriety" alone, respondent further notes that petitioner is unable to demonstrate that he would be entitled to habeas relief on such a basis, given this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), which disapproved the use of novel grounds to grant relief on an application for habeas corpus. Moreover, as pointed out in the majority opinion below, the same is true of any type of proposed bright-line rule "invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases." (J.A. 80).

Even if it could be gleaned from this Court's constitutional jurisprudence that in a very small number of cases, the possible temptation to engage in biased behavior is so severe that an actual, substantial incentive to be biased might be presumed, as Chief Judge Posner cautioned in the decision below, such an "automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty[3] in order to vindicate an abstract interest in procedural fairness." (J.A. 78-79). The Chief Judge reasoned:

> The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. . . . *Any* judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over

[3] As the majority decision accurately reflected, "[t]he evidence of guilt presented at trial was compelling . . . . [There is] no basis for doubting the guilt of either Bracy or Collins." (J.A. 75).

> some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes.

(J.A. 79) (emphasis in original).

In connection with this argument, respondent stresses, as did the majority below, that they in no way attempt to minimize the evils of judicial corruption. But as noted in the Brief *Amicus Curiae* of Concerned Illinois Lawyers and Law Professors in Support of Petitioner, much has been done to combat the erosion of public confidence in the Illinois court system which has resulted from the judicial corruption uncovered in Cook County, (Br. *Amicus Curiae* at 17); and rightly so, the judges themselves and legislators alike are the ones who must be held accountable when there exists a public perception that the quality of justice in a particular venue has deteriorated. But as the majority opinion below also suggests, the answer to restoring the public's faith in the integrity of the justice system does not lie in ignoring the obvious cost to society of reversing the convictions of guilty criminal offenders such as petitioner in order to vindicate a theoretical interest in procedural fairness.

In turning to the question of whether the petitioner made the showing necessary to obtain discovery in support of his claim that he was denied his right to an impartial judge, respondent echoes the majority below who noted that a presumption, such as petitioner proposes, that "a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition" to treat this case as if Judge Maloney had in fact taken a bribe from the prosecution to convict. (J.A. 82). When the presumption is thus properly rejected, as was done below, the case is one "in which there is merely an

appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process." (J.A. 82). It necessarily follows then that because petitioner cannot establish a constitutional violation by showing merely an "appearance of impropriety," he correspondingly was unable to make the showing necessary to obtain discovery in support of his due process claim simply by producing some evidence of a questionable appearance, regardless of how much evidence he mustered in support of that theory.

If, on the other hand, petitioner had made a credible showing that Judge Maloney exhibited some actual bias in conducting his trial and sentencing hearing, he would have been entitled to discovery in support of his due process claim. *See Del Vecchio v. Illinois Department of Corrections*, 31 F.3d at 1379 (*quoting Murchison*, 349 U.S. at 136) ("'Fairness of course requires the absence of actual bias in the trial of a case.'"); *cf. Cuyler v. Sullivan*, 446 U.S. 335 (1980) (to prove *per se* ineffective assistance of counsel due to conflict of interest, petitioner must show evidence of an actual conflict). Although petitioner has never come right out and argued that Maloney exhibited actual bias against him, he has and does complain about some of the judge's rulings which went against him and his co-defendant, implying that the adverse rulings were the consequence of the judge taking bribes in other cases. But as the majority of the three-judge panel below found after first stressing that this was a jury trial and sentencing—the outcome of which the presiding judge has less responsibility for than when the proceedings are held before a judge alone—"they [Bracy and Collins] have not shown that there were so few rulings in their favor that the judge *must* have been

biased in favor of the government." (J.A. at 82) (emphasis in original). And in fact, "[t]his may be a case in which *any* judge would have ruled in favor of the government in the instances of which the defendants complain." (J.A. at 83-84) (emphasis in original). Indeed, in concluding that petitioner had not shown good cause to justify further discovery, the district court judge below noted as well that "they [Bracy and Collins] do not point to any particular adverse ruling that would have been favorable to them before another judge." *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 991 (N.D. Ill. 1994).

To be sure, petitioner stops short of claiming that the judge's discretionary rulings were wrongly decided which, in the first instance, explains why many of the rulings now complained of were never even appealed. Moreover, as noted by the majority below, those that were raised on appeal were later ratified by the Illinois Supreme Court. (J.A. 82).

Additionally, when examining these rulings specifically, it is clear that they provide no evidence of actual bias on the part of Judge Maloney, since they are not only within the proper boundaries of judicial discretion, but are in fact correct. For example, both petitioner and the dissent below point to the trial court's denial of co-defendant Roger Collins's motion to suppress evidence as one example of how Maloney could improperly shape the outcome of the trial. (Pet. Br. at 5; (J.A. 111)). An independent examination of this issue, however, reveals that in denying the motion to suppress, the trial court made a legally defensible decision.

Specifically, co-defendant Collins claimed that certain photographs taken by police from a trash bag on an open

second-floor porch of the apartment building where he lived violated his Fourth Amendment rights against unreasonable search and seizure. At the hearing on Collins's motion to suppress, he testified that the photographs were taken from a suitcase in his closet inside the apartment. (TR 308-309). He claimed that there were no trash receptacles on the second-floor porch of his building and that trash had to be carried by the tenants to a ground floor receptacle in the rear of the building. (TR 309-311). Officer Michael Hoke of the Chicago Police Department refuted this testimony, stating that on February 5, 1981, he arrested Collins on the basis of an outstanding parole violation warrant. (TR 365-367). Following the February 21, 1981 arrest of petitioner and Murray Hooper, Hoke returned to Collins's apartment building to speak to neighbors. (TR 368-369). Receiving no answer at the door of either second-floor apartment at the front of the building, he and his companions went to the rear of the building and ascended the rear stairs to an open, wooden, second-floor porch. (TR 369). On that porch, near the rear door of Collins's apartment, they discovered a plastic trash bag. Examination of the contents of this bag revealed five photographs and a piece of paper, all of which the officers seized. (TR 370-374). One of these photographs was later admitted at trial as it showed Collins wearing a broad-brimmed hat similar to that described by witnesses. (TR 423, 500, 734). In rebuttal, Collins called the building's janitor who stated that there were no garbage cans on the building's rear porches, and that it was the duty of tenants to take the trash out to the alley. (TR 385-388). This witness admitted, however, that from time to time tenants did leave bags of trash on the rear porches, although they were not supposed to do so. (TR 387, 391).

At the conclusion of the hearing, Judge Maloney rejected the version of the search presented by Collins and found, instead, Officer Hoke to be the more credible witness. (TR 397-398). He further found that by leaving the bag on the rear porch, Collins had abandoned any reasonable expectation of privacy in it and the officers had committed no violations of Collins's rights by seizing its contents. (TR 398).

The propriety of this ruling is born out by the record. Collins's own witness bolstered Hoke's testimony by stating that tenants were known to leave trash on the porch instead of transporting it to the dumpster on the ground floor. Maloney's credibility determination, therefore, raises no suspicions concerning his impartiality.

Nor does Maloney's legal ruling in connection with this issue raise any red flags. When property has been abandoned, a defendant no longer has any reasonable expectation of privacy in it and cannot complain that its seizure represents a violation of his rights under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217 (1960); *Katz v. United States*, 389 U.S. 347 (1967).

On direct appeal, the Illinois Supreme Court considered the claim and affirmed Maloney's ruling, agreeing that Collins had no reasonable expectation of privacy in the contents of a garbage bag placed in an open, accessible, common area of the apartment building. *People v. Collins*, 106 Ill. 2d at 265-266, 478 N.E.2d at 278-279.

In connection with the sentencing phase of his trial, petitioner complains that the trial judge declined to grant his co-defendant's request for a separate penalty hearing. (Pet. Br. at 5). Counsel for Collins made the request notwithstanding his assertion at the time that

"there is no conflict here, and there wasn't any conflict *per se* between the two defendants[.]" (TR 1432). Counsel based his request solely on the fear that evidence of the unrelated Arizona crimes committed by petitioner Bracy would be imputed to Collins as well. (TR 1433). The trial court denied the request after assuring counsel that a limiting instruction would inform the jury that the aggravating evidence applied to Bracy only. (TR 1438, 1496). This decision was not appealed.

Clearly, if a claim is not deemed worthy of inclusion in a direct appeal, one obvious explanation for such a strategy is that the claim lacks merit. Moreover, a separate sentencing hearing in this case would have inured only to Collins's benefit, not petitioner's, and thus the judge's denial of the motion does not tend to show actual bias against petitioner Bracy in any event.

Petitioner also implies that his attorney's unsuccessful attempt to obtain a continuance prior to the sentencing hearing demonstrates bias. (Pet. Brief at 5). The continuance was sought in order to investigate the double murder and attempted murder charges pending against petitioner in Arizona. (TR 1439). Counsel conceded that he had been served with the complete set of Arizona police reports at the outset of the Illinois trial. (TR 1440-1443). The trial court refused the request, noting that the jury was empaneled and that counsel was in possession of the relevant materials. (TR 1445-1450). The Illinois Supreme Court affirmed this ruling, also noting that Bracy had in fact subsequently been convicted of the Arizona crimes. *People v. Collins*, 106 Ill. 2d at 281, 478 N.E.2d at 286. That court held:

> Since the purpose of the continuance would have been to allow Bracey's [sic] counsel to gather evidence to show that Bracey [sic] had not committed the Arizona crimes, we fail to see how he is now prejudiced. If we were to find the denial of the continuance to have been improper and remand for a new sentencing hearing, the State would then introduce Bracey's [sic] Arizona convictions into evidence, thus raising an even stronger inference that Bracey [sic] committed the Arizona crimes. We do not feel the denial of the continuance was in error.

Id. at 281; 286-287.

Although the fact that petitioner was not prejudiced by the unfavorable ruling regarding the continuance is irrelevant to whether the ruling shows actual bias, the fact that the ruling is legally defensible is pertinent to the bias issue. And as the majority of the three-judge panel below concluded, "[i]t [the continuance] was properly denied." (J.A. 93). The majority noted that in Illinois, a capital defendant is ordinarily sentenced by the same jury that convicted him. "Since it is the same jury, the sentencing hearing perforce follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this, and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends." (J.A. 93-94).

Petitioner further points to the fact that Judge Maloney admitted evidence in aggravation at sentencing of unadjudicated murders and an attempted murder in Arizona. (Pet. Br. at 5). The Illinois Supreme Court, however, found no abuse of discretion, noting that "[w]e have held in the past that the jury at the second stage of the death sentencing hearing may consider any evidence which is shown by reliable testimony and is relevant in

aggravation or mitigation." The state high court then concluded that unadjudicated criminal charges are included in this type of admissible aggravating evidence. *People v. Collins*, 106 Ill. 2d at 282, 478 N.E.2d at 287. This is yet another example of a discretionary ruling that is irrefutably legally defensible. The evidence was both reliable and relevant—reliable, as it was testified to by the sole survivor of Bracy's Arizona murder spree, and relevant since it conveyed to the jury petitioner's status as an unrehabilitated recidivist. Moreover, petitioner was in fact later convicted and sentenced to death for his Arizona crimes. (J.A. 94). In short, this evidence was admissible under Illinois law and no improper motive can be ascribed to its admission.

As his last complaint with respect to Judge Maloney's rulings, petitioner echoes the dissent of Judge Rovner in noting that the trial court may have influenced the jury by permitting the prosecution to engage in improper argument. (Pet. Br. at 5-6, *citing* J.A. 111). The Illinois Supreme Court found no fault with the prosecution's argument, however, concluding that defense counsel had invited the comments by virtue of his own argument and thus could not be heard to complain. *Collins*, 106 Ill. 2d at 283-84, 478 N.E.2d at 287. Other portions of the State's argument had not been objected to during the trial, and were thus deemed waived on appeal. *Id.*

In further support of his argument that he in fact made an adequate preliminary showing of a violation of his due process rights, thereby entitling him to discovery, petitioner points to the transcript of Maloney's federal trial and argues, for the first time in any court, that it too yields evidence of actual bias on the part of the former judge. As the dissent below noted as well, petitioner urges that the *Maloney* transcript shows that, according to the testimony of William Swano, a witness who cooperated with the Government, "on at least one occasion Judge Maloney rendered a guilty verdict in a weak prosecution case as a means of advertising his desire to obtain bribes." (Pet. Br. at 17). What petitioner fails to also point out, however, is that in the *Davis* prosecution, to which he is referring, William Swano was so confident of obtaining an acquittal that he neglected to proffer the usual payment to Judge Maloney and the judge subsequently convicted Swano's client after a bench trial—an action construed by Swano as a "lesson." (J.A. 99-100). Respondent asserts, therefore, that the Swano story, as odious as it may be, is of minimal significance in showing that Maloney was actually biased against petitioner in this case. As even Judge Rovner's dissent concedes, Maloney had not sought a bribe from the defense attorneys in this case, and there is no suggestion that they had ever previously bribed Maloney in connection with prior cases. Accordingly, Maloney had no reason to expect a bribe from petitioner's attorneys and thus would have had no reason to feel aggrieved by the lack of one.

In sum, petitioner was unable to make a threshold showing consisting of some evidence tending to show the existence of the essential elements of his constitutional claim. Such a showing would have required some evidence that Judge Maloney was actually biased against petitioner. Accordingly, the district court's denial of petitioner's discovery motion did not amount to an abuse of discretion.

Moreover, it is also significant to note, as the majority did below, that petitioner's first and third requests for

discovery materials, *i.e.*, the sample of Judge Maloney's cases in which he did not take bribes, as well as any evidence the federal Government might have obtained in its prosecution of Maloney indicating that he was in fact biased in favor of the prosecution in cases in which he was not bribed, did not even require formal discovery since all of Maloney's cases and the transcript of his own racketeering trial were matters of public record.[4] And, as for the petitioner's request to depose some of the persons and witnesses who were most intimately associated with Judge Maloney, the majority properly characterized this proposal as nothing more than a "fishing expedition," noting that "[e]ven if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in *this* case." (J.A. 83) (emphasis supplied).

[4] The majority noted that although the transcript from Maloney's racketeering trial had previously been sealed, "it was unsealed in August of 1994, so that the petitioner's lawyers have had a year and a half to look for clues in that record." (J.A. 83).

CONCLUSION

For all of the foregoing reasons, the respondent, Richard B. Gramley, respectfully requests that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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